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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 700

SANGAMON VALLEY TELEVISION CORPORATION and STATE OF ILLINOIS, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 324 F.2d 379. The decision of the Federal Communications Commission (J. App. 303-332)[1] is not officially reported, but is reported unof-

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[1] "J. App." refers to the printed joint appendix filed in the court of appeals.

ficially at 23 Pike and Fischer, Radio Regulation 1579.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1963. A petition for rehearing *en banc* filed by Sangamon Valley Television Corporation was denied on September 25, 1963; a petition for rehearing *en banc* filed by the State of Illinois was denied on November 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1354(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated Section 307(b) of the Communications Act or acted arbitrarily when it substituted two UHF television channels for a VHF channel at Springfield, Illinois, upon the finding that the public interest would be better served if the channel assignments at Springfield were all UHF.

STATUTE INVOLVED

Section 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, is set forth in the petition at p. 2.

STATEMENT

On July 18, 1962, the Federal Communications Commission assigned UHF channels 26 and 36 to Springfield, Illinois, and transferred VHF channel 2 from that city to St. Louis, Missouri, and Terre Haute,

Indiana (J. App. 303-332). The order results from a new rule-making proceeding instituted after the court below, upon a remand from this Court, had vacated a similar order of the Commission issued on March 1, 1957 (22 F.C.C. 318) because of *ex parte* approaches made to Commissioners. *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49; *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.); *Sangamon Valley Television Corp.* v. *United States*, 294 F. 2d 742 (C.A.D.C.). The petition for certiorari challenges the Commission's action on the merits.

The pertinent background is as follows:

1. On April 14, 1952, the Commission issued its "Sixth Report and Order" (17 F.R. 3905) promulgating a nationwide Table of Assignments of television channels. That order, which added 70 UHF channels to the 12 VHF channels previously available for television broadcasting, "intermixed" both UHF and VHF assignments in most communities. Contrary to the Commission's expectation, however, the UHF channels were not extensively used where intermixed with VHF channels. Following a general allocation proceeding to look into the matter, the Commission issued its *Second Report on Deintermixture* on June 26, 1956 (21 F.R. 4958; 13 Pike and Fischer, Radio Regulation 1571). It there concluded that UHF stations, although providing satisfactory service and capable of competing successfully with other UHF stations, were unable as a general rule to survive direct competition by VHF stations. The chief reasons were that UHF

transmission covers a smaller area in some terrains and most television sets were not equipped to receive UFH signals; so that UHF stations were at a competitive disadvantage *vis-à-vis* VHF stations in obtaining network affiliations, listeners, and advertisers. *Id.*, 21 F.R. at 4959; 13 Pike and Fischer, Radio Regulation at 1574.[2] Pending a long range solution to the problem of making effective use of the 70 UHF channels, the Commission decided to take interim action to improve the opportunities for more effective competition among a greater number of television stations in individual areas by "deintermixture", i.e., by deleting VHF channels from predominantly UHF areas and adding VHF channels to predominantly VHF areas. It set forth general criteria for determining the appropriate areas, and issued notices of proposed rule making looking toward the addition or deletion of VHF channels in thirteen communities. *Id.*, 21 F.R. at 4962; 13 Pike and Fischer, Radio Regulation at 1582-1583.

One of these thirteen notices (Docket No. 11,747; 21 F.R. 4968) proposed to substitute a UHF channel for VHF channel 2 in Springfield, Illinois, and to assign channel 2 to St. Louis, Missouri. At that time Springfield had one VHF channel (channel 2) assigned but not in use, and two UHF channels (one of which was reserved for educational use). Following

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[2] See also, *Greylock Broadcasting Co.* v. *United States*, 251 F. 2d 748, 749 (C.A.D.C.); *Coastal Bend Television Co.* v. *United States*, 234 F.2d 686 (C.A.D.C.); Note, *The Darkened Channels: UHF Television and the FCC*, 75 Harv. L. Rev. 1578, at 1582 *et seq.* (1962).

a rule making proceeding, the Commission issued an order on March 1, 1957, substituting two UHF channels for Channel 2 at Springfield, and transferring Channel 2 to St. Louis and Terre Haute, Indiana. The Commission's order also modified the authorization of Signal-Hill Telecasting Corporation (Signal Hill), the then existing licensee on Channel 36 in St. Louis, to provide for temporary operation on Channel 2 pending a hearing among competing applicants for regular operation on that channel. *Television Allocations in Springfield, Ill.-St. Louis, Mo. Areas*, 22 F.C.C. 318.

On petition for review by Sangamon Valley Television Corporation (Sangamon), an applicant for Channel 2 at Springfield, the court below affirmed the deintermixture of Springfield, holding that the Commission's order was not inconsistent with Section 307 (b) of the Communications Act, 47 U.S.C. 307(b), or otherwise improper. *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (C.A.D.C.).

Sangamon petitioned this Court for certiorari. In opposing certiorari on the merits, the Solicitor General and Commission counsel called the Court's attention to testimony before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, given subsequent to the decision of the court of appeals, which indicated that certain parties to the rule making proceeding had made *ex parte* presentations on the merits to members of the Commission while the proceeding was pending before the Commission. In light of the Government's representations, the Court granted certiorari, vacated the

judgment below, and remanded the case for such action as the court of appeals might deem appropriate. *Sangamon Valley Television Corp.* v. *United States*, 358 U.S. 49. The court of appeals thereupon vacated the Commission's order of March 1, 1957, and remanded the case to the Commission for an evidentiary hearing on the alleged misconduct. *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (C.A.D.C.). Upon receipt of the Commission's report (*Sangamon Valley Television Corp.*, 19 Pike & Fischer, Radio Regulation 1055), the court of appeals held that basic fairness and the passage of time necessitated a fresh start to the rule making, and an up-to-date record, but that the Commission need not reconsider its conclusions as to the *ex parte* matters. *Sangamon Valley Television Corp.* v. *United States*, 294 F.2d 742 (C.A.D.C.).

In the meantime, the Commission continued to consider measures to aid the development of UHF service generally, and, on July 27, 1961, initiated eight new deintermixture proceedings. *In the matter of Fostering Expanded Use of UHF Television Channels*, Docket No. 14229, 21 Pike & Fischer, Radio Regulation 1711, 1714. It also recommended legislation authorizing the Commission to require that all television sets shipped in interstate commerce be equipped to receive UHF as well as VHF channels, and Congress enacted the proposal. Public Law 87-529, July 10, 1962, 76 Stat. 150. When the bill was being considered, the Commission, in response to Congressional inquiry, stated that it would stay the eight new deintermixture proceedings begun on July 27, 1961, during the

period needed to indicate whether the all-channel receiver legislation would in fact achieve the Commission's goal of a satisfactory intermixed television system (J. App. 319). However, the Commission expressly excluded from the proposed "moratorium" four pending deintermixture proceedings, including that involving Springfield (*ibid.*) and Congress acquiesced in this reservation. See H. Rep. No. 1559 on H.R. 8031, 87th Cong., 2d Sess., pp. 7-8, 18-23; S. Rep. No. 1526 on H.R. 8031, 87th Cong., 2d Sess., pp. 6-7, 13-16.

2. By a Notice issued on September 11, 1961, the Commission had instituted an entirely new rule making proceeding with respect to the assignment of Channel 2 (J. App. 6-7). After receiving comments and reply comments from all interested persons, the Commission issued a Report and Order on July 18, 1962, in which it again concluded that the public interest would best be served by substituting UHF Channels 26 and 36 for Channel 2, the only VHF channel in Springfield (J. App. 303-321). It also assigned Channel 2 to St. Louis and Terre Haute, where it would "fit" if not used in Springfield (J. App. 331-332, 321-328). As a result of this action Springfield, which previously had been assigned one VHF channel and two UFH channels (one of which was reserved for educational use), now has four UHF channels. Although petitioner Sangamon was an applicant for Channel 2 at Springfield, the channel has never been used there (J. App. 309, 315). A UHF station has operated on Channel 20 at Springfield since 1953, and competing applications have been

tendered to the Commission for the use of Channel 26 at Springfield (J. App. 311).

In determining that the deletion of Channel 2 from Springfield would serve the public interest, the Commission stated that its general objective was (J. App. 328):

> to distribute television channel assignments in the manner which is most likely to augment opportunities for full and effective use of the television broadcast frequencies and to provide the greatest amount of television service to the public in the communities involved . . .

and that, with respect to Springfield, its primary purpose was (J. App. 309-310):

> to provide Springfield, the capital of the State of Illinois, with a 1960 population of 83,271 and a population of 146,539 in its home county (Sangamon), with television assignments which offer the most realistic opportunities for the development of adequate television services to fill the needs and interests of the residents of the Springfield area. The question we must decide is whether all UHF assignments or VHF Channel 2 in combination with UHF assignments would best do so under present conditions, for it does not appear that other VHF channels may be assigned to Springfield under existing rules.

The Commission's decision—making the television assignments in Springfield all UHF—took account of the fact that existing television service in the Springfield area is predominantly UHF (J. App. 310-313): In addition to the UHF station operating on Channel

20 at Springfield, a UHF station at Decatur, Illinois, is providing service to the immediate Springfield area, and three other UHF stations at Peoria, Illinois (about 58 miles north of Springfield), serve portions of the Springfield area (J. App. 311). The nearest VHF station is at Champaign, Illinois, approximately 78 miles northeast of Springfield (J. App. 311). The Commission found that UHF in the Springfield area was providing satisfactory service and making progress despite the handicap of competing with one outside VHF signal (from Champaign) (J. App. 310-313). Noting that by 1960 all of the homes having television sets in Sangamon County (in which Springfield is situated) were equipped for UHF reception, that substantial percentages of the television homes in neighboring counties were similarly equipped, that public acceptance of UHF in central Illinois had increased substantially since 1957, and that the UHF stations at Springfield and Decatur had taken measures to extend their coverage by increasing antenna height and power, and/or by establishing semi-satellite or translator stations (J. App. 312-313), the Commission concluded that UHF services in the Springfield area could be expected to continue to improve and expand if not subjected to additional VHF competition from a local station in Springfield (J. App. 320, 317),[8] whereas, on the contrary, the introduction of

[8] The Commission also considered the circumstance that a potential "white area" (area without service) might result from the deletion of channel 2 from Springfield since a VHF station would reach a larger area than the UHF stations, but concluded from the record that there would be no significant white area problem and that it was not in any

a second competitive VHF service in Springfield itself would preclude further UHF growth and cause a serious deterioration in the existing UHF services at Springfield and Decatur (J. App. 314-315). In view of the "blighting effect on existing UHF stations and on UHF development in the near future" which would be caused by a new VHF station at Springfield and the impossibility of assigning additional VHF channels to Springfield (J. App. 319-320, 310), the Commission determined that the public in the Springfield area would receive more television service if Channel 2 were deleted and two UHF channels substituted (J. App. 320-321, 328). It rejected the argument that it should refuse to deintermix Springfield because of the all-channel receiver legislation, noting that a new VHF station at Springfield would have immediate adverse effects on television service and that it would be some years before this legislation would alleviate the problems of UHF-VHF competition (J. App. 318-320).

3. The court of appeals (Chief Judge Bazelon and Judge Washington, with Judge Wright dissenting) affirmed the Commission's action with respect to Springfield (Pet. 1a-21a). It re-

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event likely to be permanent in view of the improvements in UHF service which could reasonably be expected (J. App. 315-317).

In a consolidated case brought by Fort Harrison Telecasting Company, a would-be applicant for channel 2 at Terre Haute which challenged the Commission's decision to consider only previously filed applications for channel 2 in Terre Haute, the court remanded with directions to accept

jected (Pet. 7a-10a) the arguments of Sangamon and the State of Illinois that Section 307 (b) of the Communications Act requires an equal distribution of VHF facilities among the States and communities. Citing *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 281-282, the court concluded that (Pet. 7a-8a):

> . . . so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community, the standard set out in Section 307(b) is fully met.

The court held (Pet. 8a-10a) that the Commission's action in giving Springfield four UHF channels (one reserved for educational use) met this test, stating (Pet. 10a): "it is not within our competency or function to say that Springfield's need could be met only by a single VHF channel rather than by two additional UHF channels, in light of all the circumstances shown." Finally, the court rejected (Pet. 11a-12a) petitioners' contentions that the Commission's 1962 decision to deintermix Springfield was arbitrary because the result duplicated the 1957 decision or because new deintermixture proceedings are being held in abeyance pending results from the all-channel receiver legislation.

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new applications for channel 2 at Terre Haute (Pet. 11a-17a). This aspect of the decision below is not involved in the petition for certiorari.

ARGUMENT

The decision below is correct and the petition presents no question of general importance warranting further review.

1. Petitioners' principal contention (Pet. 14-19)—that the substitution of two UHF channels for VHF channel 2 in Springfield violates the mandate of Section 307(b) of the Communications Act—rests on the basic misconception that the statute requires an equitable distribution of VHF channels as such, without regard to the concommitant distribution of UHF channels. But Section 307(b) provides that "the Commission shall make such distribution of . . . frequencies . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of *radio service* to each of the same" (emphasis added).[3] While it might well be proper to assign television licenses among the States without regard to the distribution of standard broadcast (AM) or FM frequencies, since they are different services, both UHF and VHF stations comprise one type of broadcast service which must be allocated as a whole.

The Commission here determined that Springfield would enjoy more television service if it had four competitively equal UHF channels rather than one competitively superior VHF channel which could not be supplemented with additional VHF assignments, and which would preclude the successful establishment of new UHF stations and seriously affect the ability

[3] Television is included within the definition of radio service. See Section 3(b) of the Communications Act.

of existing UHF stations in the area to continue in operation. In light of this finding, the Commission also determined that Channel 2 could be better utilized to provide another needed competitive service at St. Louis and in Terre Haute, since the existing VHF stations in these cities precluded the use of UHF assignments to meet their need for more service (J. App. 321, 322-323). These determinations meet the test of Section 307(b), as the court of appeals correctly held (Pet. 8a). The court below properly ruled that the standard of this section is fully met "so long as the television transmission service allocated to a community, whether it be solely VHF, UHF, or a combination of both, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community" (Pet. 8a).

Notwithstanding petitioners' assertion to the contrary (Pet. 13-16), this construction of Section 307 (b) is fully in accord with the decision of this Court in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266. In the *Nelson* case, the Court declined to construe the comparable provisions of the Radio Act of 1927, 44 Stat. 1166, as requiring equality among the States with respect to every type of station, stating (289 U.S. at 281-282):

> We find in the Act no command with the import upon which respondents insist. The command is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within

> each zone." It cannot be said that this demanded equality between States *with respect to every type of station* . . . . In making its "fair and equitable allocations", the *Commission was entitled and required to consider all the broadcasting facilities assigned to the respective States*, and all the advantages thereby enjoyed, and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected by the granting of the application of Station WJKS and the deletion of Stations WIBO and WPCC. [Emphasis added.]

Nor does the decision below conflict with *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358. This Court there approved the principle that the Commission, when considering mutually exclusive applications for stations to serve different communities, should base its decision on which community has the greater need for service (349 U.S. at 361-362). But, as the court below noted (Pet. 7a), that does not mean "that the relative needs of two communities for television transmission service [must] be determined solely on the basis of the need for *VHF* service."[6]

The Commission did not ignore the relative need of Springfield for television service. Rather, it deter-

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[6] The State of New Jersey, for example, lies in a comparatively small area between the States of New York and Pennsylvania, and accordingly has only one VHF assignment, which is located at the city of Newark rather than at the state capitol. New Jersey clearly does not have an equal share of VHF channels in view of its considerable population, but this is not to say that it does not have an equal share of all channels and of television service.

mined that Springfield's need could best be met by making all television assignments in the community in the UHF bands (J. App. 318, 319-320). In *Allentown* (349 U.S. at 362) this Court recognized that the Commission, in appraising the relative needs of two communities for additional service, may properly consider the need of one of the communities for multiple local outlets. This was the approach followed in this case. The Commission weighed the adverse impact on existing and future UHF services to the public in the Springfield area which would result from a VHF station at Springfield.[7] *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475-476; *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F.2d 440, 443-444 (C.A.D.C.). In sum, the Commission deleted Channel 2 from Springfield to make it possible for Springfield to have more service, and not because it deemed St. Louis or Terre Haute to have a greater need for the channel.

2. Petitioners' further contention (Pet. 20-23) that it was arbitrary for the Commission to proceed with

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[7] Petitioners' suggestion (Pet. 17) that the Commission acted on behalf of the "private economic interests of station operators" is without foundation. The Commission stated (J. App. 328): "Our primary objective is not, as it is maintained, to protect, equalize, or improve the economic or competitive position of individual licensees, but to distribute television channel assignments in the manner which is most likely to augment opportunities for full and effective use of the television broadcast frequencies and to provide the greatest amount of television service to the public in the communities involved."

the deintermixture of Springfield when new deintermixture proceedings are being held in abeyance until the results of the all-channel receiver legislation can be determined, was properly rejected by the court below (Pet. 11a). As the court of appeals noted (*ibid.*), the Commission notified Congress that the Springfield case would be one of four deintermixture cases which might be excluded from the "moratorium" on new deintermixture proceedings,* and this exclusion was accepted by the congressional committees concerned. H. Rep. No. 1559 on H.R. 8031, 87th Cong., 2d Sess., pp. 7-8, 18-23; S. Rep. No. 1526 on H. R. 8031, 87th Cong., 2d Sess., pp. 6-7, 13-16. The all-channel receiver legislation contains no provision limiting or affecting the Commission's power to proceed with deintermixture (Act of July 10, 1962, Public Law 87-529, 76 Stat. 150).

The Commission fully considered the effect of the legislation in its decision and gave sufficient reasons for its judgment that it should proceed with this case. It noted that the proceedings held in abeyance proposed the removal of an existing VHF service, whereas the dislocation here would result from failure to deintermix, since no station has ever operated on Channel 2 at Springfield (J. App. 319). In view of the "blighting effect on existing UHF stations and on UHF development in the near future", which would

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* Another of the excluded proceedings was the *Bakersfield Deintermixture Case*, 21 Pike and Fischer, Radio Regulation 1549, affirmed *sub nom. Trancontinent Television Corp.* v. *Federal Communications Commission*, 308 F.2d 339 (C.A. D.C.), in the face of a similar argument made on rehearing with respect to the new legislation.

result from the introduction of a VHF station in Springfield, and the time required to determine whether the all-channel legislation will in fact enable UHF stations to compete on an equal basis with VHF stations, the Commission reasonably concluded that "it would disserve the public interest to take serious dislocating action which would worsen the competitive situations in several areas, in the hope that the all-channel authority would eventually alleviate or end the adverse effects of that action on the public interest" (J. App. 319-320).[9] This conclusion, which was based on "the particular circumstances of this case" (J. App. 320), does not present any question of widespread importance in light of the general moratorium on deintermixture proceedings.

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[9] Petitioners' assertion (Pet. 22-23) that the Commission treated channel 2 as legally assigned to St. Louis rather than Springfield, lacks merit. In speaking of the "proposed introduction of a second VHF competitive service" in the Springfield area, the Commission was only referring to the fact that no station had ever operated on channel 2 in Springfield (J. App. 314, 315, 319). Moreover, there is no basis for pettioners' claim (Pet. 22) that the Commission "paid no heed to the prior appellate vacating of" its 1957 decision and merely reinstated that decision. As the court of appeals properly concluded (Pet. 11a), the Commission "made its present decision in the light of current considerations and current appraisals of the needs of the communities involved, rather than those of 1957," and its present "conclusions are amply explained and supported by its findings."

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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